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Total Number of Pages in This Submission 18

Application Number	09/781,755
Filing Date	February 12, 2001
First Named Inventor	David W. Cox, Jr.
Art Unit	2876
Examiner Name	St. Cyr, Daniel
Attorney Docket Number	40091-10018

ENCLOSURES (Check all that apply)

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Firm Name	Ryndak & Suri		
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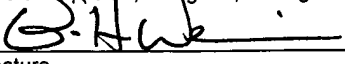
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Eric H. Weimers, Reg. No. 33,048
Name of Applicant, Assignee, or Registered Rep.

Signature Date February 27, 2006

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

A In re Application of : David W. Cox Jr.
Serial No. : 09/781,755
Filed : February 12, 2001
Title : VERIFICATION SYSTEM FOR THE PURCHASE
OF A RETAIL ITEM AND METHOD OF USING
SAME
Group Art Unit : 2876
Examiner : Daniel St. Cyr
Docket No. : 40091-10018

Mail Stop Appeal Brief-Patents
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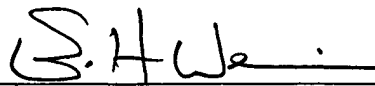
Enclosed please find the following:

1. Revised Appeal Brief,
3. Transmittal Form with Certificate of Mailing
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It is believed that no fee is required, but the Commissioner is authorized to charge or credit our deposit account number 50-0503 for any charges that may have been overlooked.

Respectfully submitted,

Date: February 27, 2006
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Eric H. Weimers
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Attorney for Applicant



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Eric H Weimers, Reg. No. 33,048

Name of Applicant, Assignee, or Registered Rep.

B. H. W.
Signature

February 27, 2006
Date

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

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REVISED APPEAL BRIEF

This Revised Appeal Brief is submitted in response to the Notification of Non-Compliant Appeal Brief mailed on February 10, 2006 and includes the changes required by the Action mailed on October 25, 2005.

I. Real Party in Interest

Applicant, David W. Cox, is the real party in interest.

II. Related Appeals and Interferences

None.

III. Status of Claims

All of the pending claims, claims 1-29, stand finally rejected and are on appeal. The Examiner rejected claims 1-3, 5, 6, and 9-20 under 35 U.S.C. 103(a) as being unpatentable over German Patent No. 2,844,242 to Ausrus in view of U.S. Patent No. 5,278,396 to McGaha. Claims 4, 7, and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ausrus in view of McGaha, and further in view of U.S. Patent No. 5,109,153 to Johnsen et al. Claims 21-29 were rejected under 35 U.S.C. 103(a) as being unpatentable over Ausrus in view of McGaha, and further in view of U.S. Patent No. 6,830,191 to Bennett.

Applicant appeals the rejections of claims 1-29. The claims on appeal are set forth in the Appendix.

IV. Status of Amendments

No amendments were filed subsequent to final rejection. All previously-filed amendments have been entered.

V. Summary of Claimed Subject Matter

A. Background Information

The following general information is provided as background for the invention, and not all of the discussion specifically involves the claims or their scope. The independent claims on appeal are addressed in Subsection V.B., below.

The invention is a system and method for verifying the legitimate purchase of a retail item by a customer. An encoding device at the point of sale provides a machine-readable indicia on a retail item label. When the retail item is presented for refund or exchange, a detecting device analyzes the label for the presence of the post-purchase indicia. Presence of the indicia indicates a legitimate return, whereas absence of the indicia signifies a fraudulent return.

The invention addresses serious problems in the retail industry in the nature of fraudulent returns for cash refunds, store credit or exchanges on

returned retail merchandise. The invention provides means for verifying that the merchandise was legitimately purchased and identifying the specific store at which it was purchased. The invention prevents fraud, such as preventing issuance of a store credit, an exchange or cash if a person attempts to return a stolen item. When the item is purchased, the encoding device places a sale indicia (i.e., "PURCHASED FROM [STORE] ON [DATE]"), or modification of a "NOT SOLD" indicia, on the merchandise tag. The indicia or modification thereof may be invisible. An item shoplifted from the store would not have the sale or modified indicia on the tag. When a person brings the merchandise back to the store, the store places the tag under a detector. An absence of the sale indicia (that may not be seen by the human eye) is detected by the detector and indicates that the item has not been purchased and the return, exchange or refund is refused. If the item was sold, the detector will show the sale or modified indicia, and the return, exchange or refund is allowed by the store.

When a customer brings a retail item to the point of sale, such as a checkout counter or sales register, encoding device 20 is used to place a machine-readable post-purchase indicia 22 onto label 12 as shown in Fig. 2. The indicia may take many forms, for example, the "S" shown in Fig. 2a. Various methods may be used to place the machine-readable indicia on the label, including photochromic, thermalchromic, magnetic, electro-magnetic, optical, electro-optical, electrical or radiofrequency technologies. (In an alternate embodiment, the decoder can remove a pre-existing indicia from the label.)

When a customer returns the retail item to the retail store for refunds or exchange, the item is taken to a detecting device 30 which is typically located at a refund or exchange counter. Detecting device 30 analyzes label 12 to determine whether post-purchase indicia 22 is present. The detecting device 30 is compatible with the technology used in the encoding device 20.

The system and method of the invention advantageously use the existing label for the retail item and do not require a separate label to be created to indicate a legitimate purchase. The post-sale indicia is placed on the label in such a way that it does not interfere with reading the merchandise and price

information on the label, e.g., information contained in a standard bar code.

The detector 30 at the return station may also remove the post-sale indicia after the item has been returned so that the item can be restocked for future sale.

The invention thus addresses a serious problem for retailers and is distinctly different from prior art systems for detecting and preventing shoplifting, inventory control, and the like.

B. Concise Explanation of the Invention Defined in the Independent Claims on Appeal

1. Claim 1

The invention of independent claim 1 is directed to a system for verifying the purchase of a retail item by a customer. The system comprises a label 12 which is attached to or otherwise associated with the retail item 10 (see Fig. 1; specification p. 4, lines 11-21). A point-of-sale station has a point-of-sale encoding device (e.g., 20 in Fig. 2) which provides a machine-readable post-purchase indicia (e.g., the "S" shown as 22 in Fig. 2a) to the label 12. (See, e.g., p. 4, line 22 to p. 7, line 16.) A return station has a detecting device (e.g., 30 in Fig. 3) for analyzing the label 12 to determine whether the post-sale indicia 22 is present. (See, e.g., p. 7, line 17 to p. 8, line 21.)

2. Claim 14

The invention of independent claim 14 is directed to a method for verifying the purchase of a retail item by a customer. The method includes the steps of providing a label 12 associated with the retail item 10 (see Fig. 1; specification p. 4, lines 11-21); encoding a machine-readable post-purchase indicia (e.g., the "S" in Fig. 2a) on the label 12 with an encoding device (e.g., 20 in Fig. 2) when the item is purchased by a customer (see, e.g., p. 4, line 22 to p. 7, line 16.); and upon return of the item, analyzing the label 12 with a detecting device (e.g., 30 in Fig. 3) to determine whether an indicia 22 is present (see, e.g., p. 7, line 17 to p.

8, line 21).

VI. Grounds of rejection to be Reviewed on Appeal

A. Whether claims 1-3, 5, 6, and 9-20 are unpatentable under 35 USC 103(a) over Ausrus in view of McGaha.

B. Whether claims 4, 7, and 8 are unpatentable under 35 U.S.C. 103(a) over Ausrus in view of McGaha and further in view of Johnsen.

C. Whether claims 21-29 are unpatentable under 35 U.S.C. 103(a) over Ausrus in view of McGaha, and further in view of Bennett.

VII. Argument

A. Introduction

The Examiner has relied on combinations of two and three references in rejecting the claims as obvious. None of the references, alone or in combination, teach or suggest the claimed invention which uses an encoding device at the point of sale to place a post-sale indicia on an original label for a retail item, and analyzes the label with a detector at a separate return station to verify the presence or absence of the post-sale indicia. Moreover, the references have been improperly combined by the Examiner because the references teach away from their combination.

B. First Ground of Rejection -- Claims 1-3, 5, 6, and 9-20

For the first ground of rejection (Section 103(a) over Ausrus in view of McGaha), claims 1-3, 5, 6 and 9-20 do not stand or fall together, because claims 10 and 20 are patentable over Ausrus in view of McGaha for additional reasons, as discussed below.

1. Claims 1-3, 5, 6 and 9-20 Are Patentable

Claims 1-3, 5, 6, and 9-20 were rejected as being obvious over Ausrus in view of McGaha. The Examiner admitted that Ausrus does not teach or suggest

a return station at a different location from the point of sale station having a detecting device for detecting post-purchase indicia, but attempts to combine the teachings of McGaha to fill in the deficiency of Ausrus.

The combination of Ausrus and McGaha to reject claims 1-3, 5, 6, and 9-20 is wholly improper because “references cannot be combined where the references teach away from their combination.” See MPEP 2145. Clearly, both Ausrus and McGaha teach away from the combination of the references.

McGaha discloses a retail checkout apparatus which, in one embodiment, prints a separate receipt having purchase information, such as date, time, and store location, directly printed on or encoded on the receipt. The receipt may be thereafter scanned when returned to validate the return. See McGaha, col. 3, line 47 to col. 4, line 3. Thus, McGaha clearly teaches away from the present invention and its combination with Ausrus. McGaha requires a *second* article, such as a receipt, to be printed and affixed to the product. McGaha makes no suggestion whatsoever as to analyzing the *original* retail item label upon the return of the merchandise to determine whether a point of sale post-purchase indicia has been added to the *original* label as in the claimed invention. Teaching away is a *per se* demonstration of lack of prima facie obviousness. *In re Dow Chemical Co.*, 837 F.2d 469 (Fed. Cir. 1988). Moreover, a reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be led in a direction divergent from the path that was taken by the applicant. *Tec Air, Inc., v. Denso Mfg. Mich. Inc.*, 192 F.3d 1353, 1360 (Fed. Cir. 1999). McGaha would clearly lead one skilled in the art in a direction divergent from the present invention.

In particular, upon a full and fair objective consideration of the complete teaching of McGaha, one skilled in the art would be taught away from encoding the original label with a machine-readable indicia. There is no suggestion whatsoever in McGaha that the information provided on the receipt could be provided on the label associated with the retail item. McGaha discloses nothing about providing a post-sale indicia on the original label, nor determining whether a post-sale indicia is present on a label. One skilled in the art would believe in

view of the McGaha reference that a second article, i.e. a receipt, would need to be created to provide additional information related to the purchase of a retail item. Therefore, McGaha teaches away from its combination with Ausrus.

Furthermore, Ausrus is not concerned with the problem of fraudulent returns. Ausrus discloses a fraud prevention system which merely ascertains whether or not an item has been purchased, and provides no further information. As such, Ausrus is a standard anti-theft device as is often seen at libraries, department stores, and the like, which only monitors whether an individual has purchased an item as they walk out the store's door. Ausrus is therefore only concerned with analyzing the label upon removal of the retail item from a premises and further teaches away from analyzing an encoded item upon return of the item to the premises. Upon a reading of Ausrus, one skilled in the art would be steered away from seeking a reference wherein a label is analyzed for the detection of a post-purchase indicia upon return of the item. Accordingly, claims 1-3, 5, 6, and 9-20 are patentable over Ausrus in view of McGaha because it is improper to combine references where the references teach away from the combination.

Moreover, the present invention is not obvious over Ausrus in view of McGaha because McGaha by itself clearly teaches away from the claimed invention. In McGaha, the original label associated with the article is scanned by the apparatus of McGaha to produce a wholly separate article, i.e., a receipt, having a bar code including sales information or other alphanumerically bearing printed sales information. Thus, McGaha clearly teaches away from the present invention where an original label associated with the item is encoded with a post-purchase machine-readable indicia by requiring a separate receipt to be printed. One skilled in the art would believe in view of the McGaha reference that a second label would need to be created to provide additional information related to the purchase of a retail item. Therefore, McGaha teaches away from the claimed invention.

2. Additional Grounds for Patentability of Claims 10 and 20

Moreover, claims 10 and 20 are not obvious over Ausrus in view of McGaha. Neither reference alone or in combination teaches or suggests a detector which removes a machine-readable post-purchase indicia after a refund is given to a customer. As discussed above, Ausrus is wholly unconcerned with analyzing the label of a retail item for a machine-readable post-purchase indicia upon return of the item. Thus, Ausrus has no teaching whatsoever of a detector which removes a machine-readable post-purchase indicia after a refund is given to a customer. Moreover, McGaha only teaches a receipt which provides sale information in alphanumeric form or encoded as a bar code. There is no disclosure whatsoever in McGaha as to a detector which removes a machine-readable post-purchase indicia after a refund is given to a customer. The Examiner implicitly admits Ausrus and McGaha lack any such teaching by concluding that that "once the returned items are verified to be in condition for re-circulation, erasing the code would have been obvious so that the item could be properly processed and made available for sale." Thus, it is apparent that the Examiner is making his own conclusions about what is in the prior art. This is a wholly improper basis for a rejection. Moreover, the Examiner cannot take official notice of what is not taught or suggested by the prior art. Accordingly, claims 10 and 20 are patentable over Ausrus in view of McGaha.

C. Second Ground of Rejection -- Claims 4, 7, and 8

The Examiner rejected claims 4, 7, and 8 under 35 U.S.C. 103(a) as being unpatentable over Ausrus in view of McGaha and further in view of Johnsen. Even if the combination of Ausrus and McGaha were proper, which it is not, the Examiner admits that the combination fails to teach or suggest that the post-purchase indicia is visible under infrared light or ultraviolet radiation. To fill in this deficiency, the Examiner resorts to a third reference, Johnsen, which is said to disclose a bar label having a bar code and a label which becomes visible when exposed to infrared light. The Examiner concludes that it would have

been obvious for a person of ordinary skill at the time the invention was made to modify the system of Ausrus as modified by McGaha by the system of Johnsen so that the bar code is invisible to provide additional security. The combination of these three references is improper and in any event fails to teach or suggest the claimed invention.

As discussed above, Ausrus and McGaha teach away from their combination, and the combination is improper. Further, Johnsen teaches away from its combination with Ausrus and McGaha.

Johnsen, like Ausrus and McGaha, is substantially different from the present invention. Johnsen is merely concerned with producing a human-readable "void" indicia on articles such as checks, currency, stock certificates, and the like by the application of radiant energy. In particular, Johnsen teaches a coupon or the like which has on its printed surface a coating of material peculiarly responsive to a form of radiant energy. Johnsen, col. 3, lines 23-26. The coupon may then be irradiated when used by radiant energy to provide a human readable "void" indicia or other visible reading on the face of the coupon to indicate the coupon is no longer valid or usable. Since the invention of Johnsen is directed to providing a simple, visible indication that the item (coupon, check, etc.) is no longer valid, Johnsen has absolutely no disclosure or suggestion as to a label associated with an item which is meant to be encoded with a machine-readable indicia at the time of purchase and thereafter analyzed upon return of the item for the indicia. Therefore, the teachings of Johnsen would lead one skilled in the art away from providing a label associated with a retail item, a point of sale station having a point of sale encoding device for the label, and a return station at a different location of the point of sale station and having a detecting device for analyzing the label.

D. Third Ground of Rejection -- Claims 21-29

Claims 21-29 were rejected under 35 U.S.C. 103(a) as being unpatentable over Ausrus in view of McGaha, and further in view of Bennett. Even if the combination of Ausrus as modified by McGaha were proper, which it

is not, the Examiner admitted that the combination fails to disclose or fairly suggest a radiofrequency indicia having a semiconductor, memory and/or microprocessor, wherein the encoding is done by a radiofrequency encoding device. The Examiner therefore again resorts to a third reference, and contends that Bennett discloses a combined optical and radiofrequency tag reader comprising a carrier having a bar code 50 and a radiofrequency tag, wherein the tag includes a storage element 68 and a processing circuit 64. The combination of these three references is improper and in any event fails to teach or suggest the claimed invention.

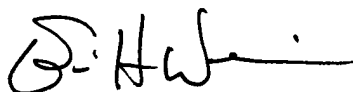
First, claims 21-29 are patentable over Ausrus in view of McGaha because there is no teaching or suggestion to combine the teachings of Ausrus and McGaha as the Examiner has done to reject claims 1 and 14, upon which claims 21-29 depend.

Second, there is no teaching or suggestion in any of Bennett, McGaha, and Ausrus to combine the references as the Examiner has done to reject claims 21-29. Bennett teaches a system and method having a bar code and a radiofrequency tag which are placed on goods or on a carrier unit for the goods for quick determination of the content of the goods. The bar code may be scanned by a reader device to generate a first set of information associated with the bar code. A radiofrequency tag may be scanned by the reader device, based on the information obtained from the bar code, to provide more detailed information about the goods. See Abstract of Bennett. Bennett, however, does not teach or suggest the desirability of encoding an original label with information by radiofrequency upon purchasing of an original item and thereafter analyzing the label by radiofrequency to determine whether the machine-readable post-purchase indicia is present. Thus, Bennett further does not provide any motivation or suggestion for combining the references of Bennett, McGaha, and Ausrus.

CONCLUSION

In view of the foregoing, claims 1-29 are allowable over the prior art of record cited by the Examiner. Applicant respectfully requests that the Board reverse the Examiner's rejections and that claims 1-29 be allowed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "E. H. Weimers", with a stylized flourish at the end.

Eric H. Weimers
Registration No. 33,048
Attorney for Applicant

Date: February 27, 2006

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CLAIMS APPENDIX

Listing of Claims on Appeal:

1. A system for verifying the purchase of a retail item by a customer comprising:

a label associated with the retail item, said label lacking a post-purchase machine-readable indicia;

a point of sale station having a point of sale encoding device, said encoding device providing a machine-readable post-purchase indicia associated with the label during purchase by the customer; and

a return station at a different location from a location of the point of sale station and having a detecting device for analyzing the label to determine whether the post-purchase machine-readable indicia is present.

2. The system of claim 1 wherein said post-purchase machine-readable indicia is machine readable only.

3. The system of claim 1 wherein said post-purchase machine-readable indicia is invisible.

4. The system of claim 1 wherein said post-purchase machine-readable indicia is visible when radiated with far-red, infrared or ultraviolet radiation.

5. The system of claim 1 wherein said encoding device provides said machine-readable indicia photochemically, thermalchromically, magnetically, electro-magnetically, optically, electro-optically, holographically, electrically or via radiofrequency.

6. The system of claim 1 wherein the composition of said label is selected from the group consisting of paper, plastic, photochromic material, thermachromic material, magnetic material, electrically conductive material, holographic material, a microprocessor, a microchip, or a memory chip.

7. The system of claim 1 wherein said label is comprised of a plurality of layers.

8. The system of claim 1 wherein said label is a bar code.

9. The system of claim 1 wherein a refund for the retail item is conditioned upon the detection of the post-purchase machine-readable indicia by the detecting device.

10. The system of claim 9 wherein said detector removes said machine-readable post-purchase indicia from said label after a refund is given to the customer.

11. The system of claim 1 wherein said machine-readable post-purchase indicia identifies the store where the retail item was sold.

12. The system of claim 1 wherein said machine-readable post-purchase indicia identifies the date and time of sale for the retail item.

13. The system of claim 1 wherein the machine-readable post-purchase indicia identifies the method of payment used to purchase the retail item.

14. A method for verifying the purchase of a retail item by a customer comprising:

providing a label associated with the retail item, said label lacking a machine-readable post-purchase indicia;

encoding a machine-readable post-purchase indicia associated with the label by a point of sale encoding device when the item is purchased by the customer; and upon return of said retail item analyzing said label with a detecting device to determine whether the machine-readable post-purchase indicia is present.

15. The method of claim 14 wherein a refund for the retail item is conditioned upon the detection of the post-purchase machine-readable indicia by

the detecting device.

16. The method of claim 14 wherein the encoding of the post-purchase indicia produces an invisible post-purchase indicia.

17. The system of claim 1 wherein said encoding device provides the machine readable indicia when the label is scanned during purchase.

18. The system of claim 14 wherein the encoding is performed when the label is scanned during purchase.

19. The system of claim 1 wherein the post-purchase indicia is removable after the retail item is exchanged or refunded.

20. The method of claim 14 wherein the post-purchase indicia is removable after the retail item is exchanged or refunded.

21. The system of claim 5 wherein said encoding device is a radiofrequency encoding device.

22. The system of claim 21 wherein the post-purchase machine-readable indicia of the label is detectable by radiofrequency.

23. The system of claim 22 wherein the detecting device is a radiofrequency detecting device.

24. The system of claim 21 wherein said encoding device produces said post-purchase machine-readable indicia by radiofrequency.

25. The system of claim 24 wherein said label comprises at least one of a semiconductor, a microprocessor, and a memory chip for storing said radiofrequency produced indicia.

26. The system of claim 25 wherein said detecting device for analyzing the label to determine whether the post-purchase machine-readable indicia is present comprises a radiofrequency detector capable of detecting said radiofrequency indicia on said label.

27. The system of claim 24 wherein the label comprises a plurality of layers to conceal the at least one of a semiconductor, a microprocessor, and a memory chip.

28. The method of claim 14 wherein said encoding is done by radiofrequency.

29. The method of claim 14 wherein said analyzing is done by

radiofrequency.